IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-26

HENRY DODGE, ZOLTON FERENCY, BARBARA HALPERT and DWIGHT W. JOHNSON,
Plaintiffs-Appellants,
vs.
RICHARD H. AUSTIN, Secretary of State, State of Michigan,
Defendant-Appellee,
and
LILLIAN HATCHER, EDWIN P. HUGHES, A. ROBERT KLEINER and VIRGINIA SELIN,
Intervening Defendants-Appellees.

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

JURISDICTIONAL STATEMENT

THEODORE W. SWIFT
DAVID W. McKEAGUE
DAVID VANDERHAAGEN
Attorneys for Plaintiffs-Appellants
Foster, Swift & Collins, P.C.
Suite One, Plaza One
401 South Washington Square
Lansing, Michigan 48933
Telephone: (517) 372-8050

Interstate Brief & Record Co., 719 Broadway, Detroit, Michigan 48226
962-5745—962-5752

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Opinions Below	2
Jurisdiction	2
Constitutional and Statutory Provisions Involved	3
Questions Presented	4
Statement of the Case	5
The Questions are Substantial	7
I. Mich. Const. Art. IV, § 6, in Requiring Minority Parties to Secure 25% of the Gubernatorial Vote Before Participating in the Apportionment Process and in Otherwise Limiting the Participation of Minority Parties, Denies to Plaintiffs the Right to Associate for Advancement of Political Beliefs, the Effective Right to Vote, and the Right to Equal Protection of the Laws, all in Violation of the First and Fourteenth Amendments	7
II. Mich. Const. 1963, Art. IV, §6, in Delegating the Power of Appointment of Members of the Commission on Legislative Apportionment to Political Parties, Represents an Unconstitutional Delegation of Legislative Power to Private Groups	13

III.

Page

Mich. Const. 1963, Art. IV, § 6, Mandates Appointment of Members of the Michigan Commission on Legislative Apportionment from Specific Malapportioned Geographical Areas in Violation of Plaintiffs' Rights to Equal Protection of the Law 17

IV.

Mich. Const. 1963, Art. IV, §6 is void as an Integral and Inseparable Part of a Total Apportionment Mechanism Previously Declared Unconstitutional by the United States Supreme Court 20

Conclusion 23

Appendix 25

TABLE OF AUTHORITIES

Cases:

A. F. of L. v. Watson, 327 U.S. 582 (1946)..... 3

Avery v. Midland County, 390 U.S. 474 (1968)... 7

Bianchi v. Griffing, 393 F. 2d 457 (CA 2, 1968).. 18, 19

Bullock v. Carter, 405 U.S. 134 (1971)..... 7

Campau v. City of Detroit, 14 Mich 276 (1866)... 23

Carter v. Carter Coal Co, 298 U.S. 238 (1936)....
13, 14, 15, 16

Page

Ely v. Klahr, 403 U.S. 108 (1971)..... 13

Eubank v. City of Richmond, 226 U.S. 137 (1912) 14

Gaffney v. Cummings, 412 U.S. 735 (1973).....
8, 10, 11, 15, 16, 18

Grivetti v. Illinois State Electoral Board, 335 F. Supp. 779 (ND Ill, 1971), aff'd, 406 U.S. 913 (1972) 10, 11, 16, 18

Guinn v. United States, 238 U.S. 347 (1915).... 21

Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966)..... 10

In the Matter of Reapportionment of the Michigan Legislature, Docket No. 53919..... 21

In re Apportionment of State Legislature—1964, 373 Mich 247, 128 N.W. 2d. 721 (1964).....13, 21, 22

In re Apportionment of State Legislature—1965-1966, 377 Mich 396; 140 N.W. 2d. 436 (1966); Appeal dismissed sub nom. Badgley v. Hare, 385 U. S. 114 (1966) 22

In re Apportionment of State Legislature—1972, 387 Mich 442; 197 N.W. 2d 249 (1972).....
11, 12, 21, 22

Marshall v. Hare, 227 F. Supp. 989 (ED Mich, 1964), rev'd, 378 U.S. 561 (1964).....6, 20, 22, 23

McGautha v. California, 402 U.S. 183 (1971)..... 13

Moore v. Ogilvie, 394 U.S. 814 (1969)..... 3, 7

People v. Sperry & Hutchinson Co., 197 Mich 532, 164 N.W. 503 (1917)..... 23

Pirincin v. Board of Elections of Cuyahoga County, 368 F. Supp. 64 (N.D. Ohio, 1973), aff'd, 414 U.S. 990 (1973).....10, 11, 16

	Page
Reynolds v. Sims, 377 U.S. 533 (1964)	3, 7, 13, 19, 20, 22
Sailors v. Board of Education, 387 U.S. 105 (1967)	13
Shapiro v. Thompson, 394 U.S. 618 (1969)	10
Sherbert v. Verner, 374 U.S. 398 (1963)	10
Speiser v. Randall, 357 U.S. 513 (1958)	10
Storer v. Brown, 415 U.S. 724 (1974)	11
United Citizens Party v. South Carolina State Election Commission, 319 F. Supp. 784 (S C, 1970)	14, 15
Washington ex rel Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928)	14
Weiss v. Duberstein, C 70-1200 (S.D.N.Y., Oct. 5, 1970), rev'd, 445 F. 2d 1297 (CA 2, 1971); C 70-1200 (S.D.N.Y., Sept. 1, 1971), aff'd, 465 F. 2d 1405 (CA 2, 1972), *cert. denied sub nom.* Lefkowitz v Weiss, 409 U.S. 876 (1972)	18, 19
Wesberry v. Sanders, 376 U.S. 1 (1964)	7
White v. Regester, 412 U.S. 755 (1973)	3
Williams v. Rhodes, 393 U.S. 23 (1968)	10, 12
Yick Wo v. Hopkins, 118 U.S. 356 (1886)	7, 13

Constitutional Provisions:

United States Constitution, First Amendment	4, 7, 8
United States Constitution, Fourteenth Amendment	4, 7, 8, 20
Michigan Constitution 1963, article IV, Section 6	2, 3, 4, 5, 6, 9, 11, 12, 13, 17, 19, 20, 21, 22, 23

Statutory Provisions:

	Page
28 USC §1253	2
28 USC §1331(a)	2
28 USC §1543(3)	2
28 USC §1983	2
28 USC §2201	2
28 USC §2202	2
28 USC §2281	2
28 USC §2284	2
M.C.L.A. §4.11 *et seq*, M.S.A. §2.28(1) *et seq*	2, 3, 5, 6
M.C.L.A. §168.685, M.S.A. §6.1685	8

Other:

Supreme Court Rule 13(2)	1
Supreme Court Rule 15	1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. .....

HENRY DODGE, ZOLTON FERENCY, BARBARA HALPERT and DWIGHT W. JOHNSON,
Plaintiffs-Appellants,
vs.
RICHARD H. AUSTIN, Secretary of State,
State of Michigan,
Defendant-Appellee,
and
LILLIAN HATCHER, EDWIN P. HUGHES, A. ROBERT KLEINER and VIRGINIA SELIN,
Intervening Defendants-Appellees.

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

JURISDICTIONAL STATEMENT

Pursuant to Supreme Court Rules 13(2) and 15, Appellants Henry Dodge, Zolton Ferency, Barbara Halpert and Dwight W. Johnson file this statement of Appellants' contention that the Supreme Court of the United States has appellate jurisdiction to review the judgment of the three-judge panel.

OPINIONS BELOW

The Opinions rendered below have not yet been reported. A copy of the Memorandum Opinion of Pratt, District Judge and McCree, concurring Circuit Judge; the Dissenting Opinion of Feikens, District Judge; and the "Order Denying Pro-Tanto Portion of Prayer for Injunction," dated April 24, 1974, are set forth in the Appendix.

JURISDICTION

This action was commenced by Plaintiffs on August 21, 1973 seeking equitable and declaratory relief pursuant to 28 U.S.C. §§1331(a), 1543(3), 1983, 2201 and 2202. The suit challenges the constitutionality of Mich. Const. 1963, art. IV, §6 and its statutory counterpart 1963 PA 46 (2nd ex. sess.), M.C.L.A. §4.11 *et seq,* M.S.A. §2.28(1) *et seq.* A three-judge panel was convened to hear this cause below as provided by 28 U.S.C. §§2281 and 2284.

On April 24, 1975, an Order and Judgment were entered denying the injunctive relief sought by Plaintiffs and dismissing Plaintiffs' action on the merits. Appellants' "Notice of Appeal to the Supreme Court of the United States" was filed in the United States District Court for the Eastern District of Michigan on June 20, 1975.

This is a direct appeal from the Judgment of a three-judge panel denying, after hearing, the right to an injunction against enforcement of a state statute, a case required by 28 U.S.C. §§2281 and 2284 to be heard by a three-judge court. The statutory provision conferring jurisdiction of the appeal on this Court is 28 U.S.C. §1253.

Cases which sustain this jurisdiction include: *Reynolds v. Sims,* 377 U.S. 533 (1964); *Moore v. Ogilvie,* 394 U.S. 814 (1969); *White v. Regester,* 412 U.S. 755 (1973) and *A. F. of L. v. Watson,* 327 U.S. 582 (1946).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

At issue in this action is the constitutionality of Mich. Const. 1963, art. IV, §6 and the virtually identical provisions of M.C.L.A. §4.11 *et seq,* M.S.A. §2.28(1) *et seq.* These constitutional and statutory provisions are set forth in their entirety in the Appendix. Paragraph 1 of Mich. Const. 1963, art. IV, §6 provides:

> "A commission on legislative apportionment is hereby established consisting of eight electors, four of whom shall be selected by the state organizations of each of the two political parties whose candidates for governor received the highest vote at the last general election at which a governor was elected preceding each apportionment. If a candidate for governor of a third political party has received at such election more than 25 percent of such gubernatorial vote, the commission shall consist of 12 members, four of whom shall be selected by the state organization of the third political party. One resident of each of the following four regions shall be selected by each political party organization: (1) the upper peninsula; (2) the northern part of the lower peninsula, north of a line drawn along the northern boundaries of the counties of Bay, Midland, Isabella, Mecosta, Newaygo and Oceana; (3) southwestern Michigan, those counties south of region

(2) and west of a line drawn along the western boundaries of the counties of Bay, Saginaw, Shiawassee, Ingham, Jackson and Hillsdale; (4) southeastern Michigan, the remaining counties of the state."

QUESTIONS PRESENTED

Questions presented by the Appeal are:

1. Whether the legislative apportionment mechanism provided by Mich. Const. 1963, art. IV, §6 and its statutory counterpart denies to Plaintiffs the right to associate for the advancement of political beliefs, the effective right to vote and the right to equal protection of the law, all in violation of the First and Fourteenth Amendments?

2. Whether private partisan appointment of members of the Michigan Commission on Legislative Apportionment provided by Mich. Const. 1963, art. IV, §6 and its statutory counterpart constitutes an unconstitutional delegation of legislative power to private political interests?

3. Whether Mich. Const. 1963, art. IV, §6 and its statutory counterpart, in mandating appointment of members of the Michigan Commission on Legislative Apportionment from specific malapportioned geographical areas, violates Plaintiffs' constitutional rights?

4. Whether Mich. Const. 1963, art. IV, §6 is void as an integral and inseparable part of a total apportionment mechanism previously declared unconstitutional by the United States Supreme Court?

STATEMENT OF THE CASE

This action was commenced against Richard H. Austin, Secretary of State of the State of Michigan, seeking to enjoin Defendant from giving further effect to the legislative apportionment plan adopted in 1972 by the Michigan Commission on Legislative Apportionment and to have Mich. Const. 1963, art. IV, §6 and M.C.L.A. §4.11 *et seq*, M.S.A. §2.28(1) *et seq* declared unconstitutional.

Individual Appellants are Henry Dodge, an independent voter; Zolton Ferency, former State Chairman of the Michigan Democratic Party, its 1966 gubernatorial candidate and one of the founders of the Human Rights Party of Michigan; Barbara Halpert, a former State Chairperson for the Human Rights Party of Michigan and its 1972 candidate for the United States Senate; and Dwight W. Johnson, a County Chairman of the American-Independent Party and its 1972 candidate for United States Congress (Michigan 5th Congressional District).

Appellants represent a class of independent and minority party voters and electors in the most populated areas of the state and claim that the challenged constitutional provision and statute are unconstitutional for the following reasons: (1) Said provisions effectively foreclose all but the major parties from any participation in the election process of apportionment; (2) the Michigan apportionment provisions unconstitutionally delegate a legislative function to political partisans accountable only to the major political parties they represent; (3) the composition of the Michigan Commission on Legislative Apportionment violates the doctrine of one man-one vote; and (4) the legislative apportionment mechanism provided by Mich.

Const. 1963, art IV, §6 and M.C.L.A. §4.11 *et seq,* M.S.A. §2.28(1) *et seq* is void as an integral and inseparable part of a total apportionment scheme declared unconstitutional by this Court in *Marshall v. Hare,* 378 U.S. 561 (1964).

A stipulation to grant intervention to Lillian Hatcher, Edwin P. Hughes, A. Robert Kleiner and Virginia Selin, members of the Commission on Legislative Apportionment appointed by the Democratic Party State Central Committee, as parties Defendant, and an Order granting intervention, was entered September 13, 1973.

Following a Pre-Trial Conference on October 30, 1973, a "Stipulation for Acceleration of Decision of Legal Issues and Preservation of Factual Positions" was filed on November 17, 1973, and a hearing on cross motions for summary judgment was held on November 21, 1973.

On April 24, 1974, an Order Denying Pro-Tanto Portion of Prayer for Injunction (App. p. 56), denying injunctive relief with respect to the 1974 Michigan general election was entered.

On April 24, 1975, some 17 months after hearing, an Order and Judgment were entered denying all injunctive relief to Plaintiffs and dismissing Plaintiffs' Complaint on the merits. The Dissenting Opinion of Feikens, District Judge, was also entered on said date.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The reasons why the questions presented by this appeal are so substantial as to require plenary consideration, with briefs on the merits and oral argument for their resolution, are set forth below.

I.

MICH. CONST. 1963, ART. IV, § 6, IN REQUIRING MINORITY PARTIES TO SECURE 25% OF THE GUBERNATORIAL VOTE BEFORE PARTICIPATING IN THE APPORTIONMENT PROCESS AND IN OTHERWISE LIMITING THE PARTICIPATION OF MINORITY PARTIES, DENIES TO PLAINTIFFS THE RIGHT TO ASSOCIATE FOR ADVANCEMENT OF POLITICAL BELIEFS, THE EFFECTIVE RIGHT TO VOTE, AND THE RIGHT TO EQUAL PROTECTION OF THE LAWS, ALL IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS.

It is axiomatic that the right to vote is a fundamental political right; all other rights afforded, even the most basic, are illusory if the right to vote is undermined. The right to vote has been afforded zealous judicial protection, and this protection has been extended to insure that each citizen be guaranteed an equally effective voice in the election of members of his legislature and local government. *Yick Wo v. Hopkins,* 118 U.S. 356, 370 (1886); *Wesberry v. Sanders,* 376 U.S. 1, 17 (1964); *Reynolds v. Sims,* 377 U.S. 533 (1964); *Avery v. Midland County,* 390 U.S. 474 (1968).

Judicial protection has not been limited to the actual exercise of the franchise and now extends to *all* procedures which are an integral part of the election process. *Moore v. Ogilvie,* 394 U.S. 814, 818 (1969); *Bullock v. Carter,* 405 U.S. 134, 143 (1971).

Apportionment is a crucial element of the elective process, a process which has, and is intended to have, substantial political consequences, and therefore is an integral part of the election process. *Gaffney v. Cummings,* 412 U.S. 735, 753-754 (1973). Accordingly, rights of Appellants to participate in the apportionment process are entitled to the protection afforded by the 1st and 14th Amendments.

The entire legislative apportionment process in Michigan is delegated to a Commission on Legislative Apportionment consisting of eight electors selected by the state central committees of each of the two political parties whose candidates for governor received the highest vote at the last general election preceding reapportionment. The number of members of the Commission may be expanded to twelve, the additional four members to be appointed by the state organization of a third party, if and only if a third party successfully obtains "more than 25%" of the gubernatorial vote at this election. Historically, the Commission has been composed only of eight members appointed by the Republican and Democratic state central committees.

The burdens imposed on the Appellants in their quest for a voice in the fundamental apportionment process are twofold.

M.C.L.A. § 168.685, M.S.A. § 6.1685, provides that any political party may achieve a position on the Michigan statewide ballot by filing petitions bearing the signatures of registered electors equal to not less than one percent (1%) of the votes cast for the successful candidate for Secretary of State at the last election. The following eight parties satisfied the requirements of this statute and achieved statewide non-judiciary ballot status in 1972: Democratic Party, Republican Party, American Independent

Party, Human Rights Party, Socialist Labor Party, Socialist Workers Party, Communist Party, and Conservative Party of Michigan.

The 1% elective participation requirement stands in stark contrast to the 25% apportionment commission requirement. The ready access to the ballot represents an illusory triumph since a voice in the design of the political arenas is effectively denied to minority parties. A minority party which controls 23% of the votes cast for governor in every election, but which finishes no better than third on each occasion, will never be afforded a voice in Michigan legislative apportionment. Thus, if gains are being made in any legislative district by a "minority" party, or any ethnic, racial or economic group not in harmony with the dominant political parties, the opportunities for election of a senator or representative by the minority party may be easily erased by the drawing of new district lines.

The second burden imposed on minority party Appellants is represented by the fact that Mich. Const. art. IV, § 6 absolutely denies access to the apportionment process to any more than three political parties. Michigan could well find in a pre-apportionment year general election that the Democratic Party garnered 24% of the vote, the Republican Party 23%, the Human Rights Party 22%, and the American Independent Party 22%, with the balance of the votes fractionalized. Only the two leading parties, who together represented only 47% of the vote, would then participate in apportionment. A slight switch to 25.1% of the votes for each of three parties and 24.7% for a fourth party would allow for a twelve person commission with the fourth party, a bare loser, gaining absolutely no apportionment participation.

As to the independent voter, no access whatsoever to apportionment is afforded.

When legislation or state constitutional provisions are imposed which burden protected rights, such governmental action will withstand strict scrutiny only upon a clear showing that the burden imposed is necessary to protect a compelling and substantial state interest. *Shapiro v. Thompson,* 394 U.S. 618, 634 (1969); *Sherbert v. Verner,* 374 U.S. 398 (1963); *Williams v. Rhodes,* 393 U.S. 23 (1968). The onus of demonstrating the compelling state interest, and the fact that no less intrusive means will protect the interests of the state, falls on the party seeking to justify the burden, *Speiser v. Randall,* 357 U.C. 513 (1958), and the general presumption of constitutionality afforded to state statutes and the traditional approval of state classifications are not applicable. *Harper v. Virginia State Board of Elections,* 383 U.S. 663, 670 (1966).

The state has made no showing on the record of any compelling interest, nor has it shown even a "rational basis" to explain or justify the invidious discrimination inherent in the Michigan constitutional apportionment provision. Appellants submit there is no compelling state interest or rational basis which would justify or explain the electoral burdens imposed on the Appellants. There is no interest, compelling or otherwise, which could justify the disparity between the 1% requirement for ballot qualification and the 25% requirement for apportionment participation or the limit of apportionment participation to no more than three parties.

The majority below found a "rational basis" for the burdens imposed, citing the Official Record of the Michigan Constitutional Convention and the decisions of *Gaffney v. Cummings*, 412 U.S. 735 (1973), *Grivetti v. Illinois State Electoral Board,* 335 F. Supp. 779 (ND Ill, 1971), aff'd, 406 U.S. 913 (1972) and *Pirincin v. Board of Elections*

of Cuyahoga County, 368 F. Supp. 64 (ND Ohio, 1973), aff'd, 414 U.S. 990 (1973).

Appellants submit that the Convention Record does not support the finding of the majority view. *Pirincin, supra,* as Judge Feikens correctly noted in dissent, dealt with an administrative board with no power over apportionment. In both *Gaffney, supra,* and *Grivetti, supra,* electors had direct voting access to those who were responsible for apportionment, unlike Michigan electors.

The possible access afforded American Independent Party voters, Human Rights Party voters, and independent voters to participate in the election of the established parties is no justification for the deprivation of their fundamental rights. A similar argument was summarily rejected in *Storer v. Brown,* 415 U.S. 724, 745-746 (1974):

> "But more fundamentally, the candidate who is by definition an independent and desires to remain one, must now consider himself a party man, surrendering his independent status. Must he necessarily choose the political party route if he wants to appear on the ballot in a general election? We think not."

Appellants submit that Judge Feikens was correct in determining that the apportionment function is an integral part of the protected elective process, and that Mich. Const. 1963, art. IV, § 6, imposes substantial burdens on Appellants' protected rights. See also *In re Apportionment of State Legislature—1972,* 387 Mich 442, 492-493, 197 N.W. 2d. 249, 271 (1972); T. G. Kavanagh, present Chief Justice of the Michigan Supreme Court, dissenting:

> "The provision in § 6 requiring a third party to receive more than 25% of the Gubernatorial vote in

order to obtain representation on the Commission and making no provision for representation for other parties receiving less than 25% but still representing a significant number of voters, is *invidious discrimination offensive to both the First and Fourteenth Amendments. Williams v. Rhodes,* 393 U. S. 23 (1968)." (emphasis added.)[1]

The constitutional rights of Appellants are denied by the Michigan constitutional apportionment provisions. If this denial receives the sanction of this Court, the way is left open through state apportionment provisions for states to limit the right to effectively participate in the political process to the existing major political parties, to a presently dominant political party, or for states to selectively preclude certain political parties from the right to effective participation.

[1] On October 2, 1973, the Michigan Supreme Court denied a Motion for Relief from the Final Judgment entered *In Re Apportionment of Legislature, supra,* on a four to three decision. Levin, J., on that occasion, noted that he adopted the views of T. G. Kavanagh on this issue, and Coleman, J., would have granted the Motion to allow review of this question (App. p. 59).

Two of the Justices voting to deny the Motion on October 2, 1973, are no longer members of the Michigan Supreme Court.

II.

MICH. CONST. 1963, ART. IV, §6, IN DELEGATING THE POWER OF APPOINTMENT OF MEMBERS OF THE COMMISSION ON LEGISLATIVE APPORTIONMENT TO POLITICAL PARTIES, REPRESENTS AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE POWER TO PRIVATE GROUPS.

Mich. Const. 1963, art. IV, §6 and its statutory counterpart delegate the power of selection and appointment of the members of the Michigan Commission on Legislative Apportionment to the state central committees of the major political parties. This delegation of power violates the rights of independent voters and minority party voters protected by the United States Constitution. *Yick Wo v. Hopkins,* 118 U.S. 356 (1886); *McGautha v. California.* 402 U.S. 183, 272 (1971).

It has been clearly established that the function performed by an apportionment commission is primarily a legislative function. *Reynolds v. Sims,* 377 U.S. 533 (1964), *Ely v. Klahr,* 403 U.S. 108 (1971), *In re Apportionment of Michigan Legislature—1964,* 373 Mich 247, 128 N.W. 2d 721 (1964). Although the legislative function of an apportionment commission may be delegated to an appointive body rather than an elective body, *Sailors v. Board of Education,* 387 U.S. 105 (1967), this legislative function may not be delegated to an interested party in derogation of the rights and interests of others who are also interetsed in the exercise of that legislative function.

The delegation of legislative power to private groups or associations interested in the exercise of that legislative power has been described as the unconstitutional delegation of legislative power in its most obnoxious form. *Carter v. Carter Coal Co,* 298 U.S. 238 (1936). See also

Washington ex rel Seattle Title Trust Co v. Roberge, 278 U.S. 116 (1928) and *Eubank v. City of Richmond*, 266 U.S. 137 (1912). Appellants aver that there is no distinction between the direct delegation of legislative power to a private group or association and the delegation of the power to appoint members of a group or body which may then exercise that legislative power.

The majority opinion of the District Court below found that the type of delegation present in the Michigan apportionment scheme is "readily distinguishable" from the type of legislative delegation condemned in *Carter, supra*. Appellants disagree, and ask this Court to review the permissible extent to which apportionment may be delegated to non-elective partisan political interests to the exclusion of minority party members and politically independent voters.

The power to select the members of the Apportionment Commission which is delegated to the central committees of the major parties is, in reality, the power to effectively preclude all but the members of these two parties from the apportionment process. The central committees of these political parties are presumptively interested in the outcome of legislative reapportionment and the preservation of political power and influence, an interest that can be expected to be adverse to the interests of other minority parties and to the interests of independent voters.

In *United Citizens Party v. South Carolina State Election Commission*, 319 F. Supp. 784 (S. C., 1970), a three-judge panel, relying upon *Carter, supra*, held that the South Carolina Legislature had improperly delegated its legislative power to establish the date for the filing of nominating petitions to a private political party. Delegation of the power of legislative apportionment through delegation

of the power of appointment of the members of the Commission poses even graver risks to the rights of minority parties and independent voters than the delegation held improper in *United Citizens Party, supra*, and is equally offensive to the Constitution.

Recent decisions of this Court have not modified the principle established in *Carter, supra*, with respect to delegation of legislative functions to political parties. In *Gaffney v. Cummings*, 412 U.S. 735 (1973), the issue of delegation of legislative power was not before the Court. Further, in *Gaffney, supra*, the Court held only that reapportionment:

> ". . . is the task of local legislatures or of those organs of state governments selected to perform it." 412 U.S. at 751.

The majority opinion of the District Court below erred in relying on the above language in support of its holding that the Michigan Apportionment Commission was a *constitutionally permissible* organ of the state for purposes of apportionment merely because the Commission is created by the mandate of the Michigan Constitution. The imminent danger of this holding is that the legislative power of apportionment may apparently be delegated to any private group or association, regardless of its self-interest in the exercise of that legislative power, as long as that private group or association receives a state constitutional designation. *Gaffney, supra*, does not establish that the constitutional rights of independent voters and members of minority political parties may be so easily thwarted.[2]

---

[2] It should also be noted that the "organ of the state" which assumed the function of legislative apportionment in Connecticut referred to by the Court in *Gaffney* was a bi-partisan commission selected by legislators directly accountable to all electors.

Similarly, in *Grivetti v. Illinois State Electoral Board,* 335 F. Supp. 779 (ND Ill 1971), aff'd, 406 U.S. 913 (1972), the power of selection of the members of the Illinois Legislative Redistricting Commission was delegated to *elected* members of the Legislature, and in *Pirincin v. Board of Elections of Cuyahoga County,* 368 F. Supp. 64 (ND Ohio 1973), aff'd, 414 U.S. 990 (1973), the members of the Ohio County Board of Elections, an administrative Board with no power over apportionment, were appointed by the Secretary of State of Ohio, a publicly elected official. Both of these decisions are readily distinguishable from the Michigan apportionment scheme.

Appellants submit that Judge Feikens correctly distinguished *Gaffney, supra,* and *Grivetti, supra,* in his dissenting opinion:

> "What is required is those appointing *or* composing the commission be accountable in some form to the electorate. Such was the case in both *Gaffney* and *Grivetti.* Under the Michigan scheme the members of the commission are accountable only to their respective political parties." (App. p. 55)

The majority opinion cites no authority that state central committees of political parties are not private bodies in the sense of *Carter, supra,* and Appellants submit that there is no such authority. Regardless of the specialized function of the apportionment commission and the safeguards provided by the United States and Michigan Constitutions in the exercise of the functions of the Commission, the Commission exercises much more than a ministerial function; the Commission creates the entire apportionment plan with all its attendant political and legislative effects on the entire electorate. The power to select the members of this Commission may not be constitutionally delegated to political committees to the exclusion of rights and interests of independent voters and minority party voters.

III.

MICH. CONST. 1963, ART. IV, § 6, MANDATES APPOINTMENT OF MEMBERS OF THE MICHIGAN COMMISSION ON LEGISLATIVE APPORTIONMENT FROM SPECIFIC MALAPPORTIONED GEOGRAPHICAL AREAS IN VIOLATION OF PLAINTIFFS' RIGHTS TO EQUAL PROTECTION OF THE LAW.

Mich. Const. 1963, art. IV, § 6, and its statutory counterpart provide that the eight electors appointed to the Commission on Legislative Apportionment must reside in four different specified geographical areas of the state. As the majority opinion below found,[3] four of the Commissioners represent areas containing less than 10% of Michigan's population, two represent an area consisting of aproximately 20% of the state's population, and two represent the remaining 70% of Michigan's residents. Appellants, as electors situated in the heavily populated regions, submit that such obvious malapportionment violates their individual rights and the rights of other electors similarly situated in that such a formula violates the principle of one man—one vote and denies equal protection of the law.

The members of the Commission are charged with the duty of districting and apportioning the Michigan Senate and House of Representatives. Although this function is specialized, the districting tasks assigned to the Commission are of crucial importance to every elector in Michigan. The impact of the Commission's work is statewide; and the resultant plan shapes the political future of each constituent unit.

> "It is not only obvious, but absolutely unavoidable, that the location and shape of districts may well de-

---

[3] App. p. 33, n.2.

termine the political complexion of the area . . . The reality is that districting inevitably has and is intended to have substantial political consequences." *Gaffney v. Cummings,* 412 U.S. 735, 753 (1973).

The Michigan method of selection is similar to the New York City statutory scheme which was declared unconstitutional in *Weiss v. Duberstein,* C 70-1200 (S.D. N.Y., Oct 5, 1970), *rev'd,* 445 F.2d 1297 (CA 2, 1971); C 70-1200 (S.D. N.Y., Sept. 1, 1971), aff'd, 465 F. 2d 1405 (CA 2, 1972), *cert denied sub nom. Lefkowitz v. Weiss,* 409 U.S. 876 (1972). In *Weiss,* that portion of a New York election law which allowed the chairmen of the two predominant political parties in the counties of New York and Kings to select the election commissioners for the entire City of New York was declared unconstitutional. The Court of Appeals recognized the appointive features of the law, but held that the residents of the other three counties making up the City of New York had been denied fair representation because, in reality, these residents never were and would never be appointed election commissioners.

In *Bianchi* v. *Griffing,* 393 F.2d 457 (CA 2, 1968), a statutorily mandated quasi-appointive scheme for a county governmental structure was also declared unconstitutional on the basis that the electors were denied the benefits of the one man-one vote priciple.

The majority decision below ignored *Weiss, supra,* and *Bianchi, supra,* and relied upon *Grivetti v. Illinois State Electoral Board,* 335 F. Supp. 779 (ND Ill, 1971), aff'd, 406 U.S. 913 (1972) and *Gaffney v. Cummings,* 412 U.S. 735 (1973). Appellants submit that the court below erred since those decisions did not involve commissions whose members were selected to represent specified, and malapportioned, areas of the state. The members of the Michigan

Commission do not serve the voters at-large as do the Commissioners in Illinois and Connecticut.

The requirement that members of the Michigan Legislative Apportionment Commission be appointed from malapportioned geographical areas represents an act of invidious discrimination practiced against Appellants. The Michigan Constitution mandates equal voting power in all Commissioners even though the 1970 population variations between the most populated and least populated of the four specified regions approximates 5,964,791 persons. Four of the Commissioners represent less than ten per cent of Michigan's 8,885,695 total population or 698,025 persons; two represent 21.6% of the population or 1,918,032 persons; and two represent an area containing some 6,269,138 people or 70.8% of the population. The vote of a Commissioner representing 304,347 persons is equal to the vote of a Commissioner representing in excess of six million people.

Appellants submit that the principle of *Reynolds v. Sims, supra,* applies, regardless of the appointive or elective nature of an apportionment commission, if that commission performs a vital role in the election process and is representative in nature. *Weiss, supra, Bianchi, supra.*

Appellants further submit that there is no compelling interest or rational basis which otherwise justifies the malapportionment contained in Mich. Const. 1963, art. IV, §6.

The functions of the Michigan Commission on Legislative Apportionment are pivotal, legislative, governmental, and pervasive throughout the state. The composition of the Commission on Legislative Apportionment under Mich. Const. 1963, art. IV, §6 violates Appellants' rights as electors residing in the more populated areas of the state, an onerous and peculiar situation which continues to dilute the

voting power of the overwhelming majority of Michigan citizens. If the Commissioners are to continue to be appointed, they must be appointed at-large without regard to representation of malapportioned areas, or, if area representation is to be preserved, then the areas represented must reflect the one man-one vote principle of *Reynolds v. Sims, supra.*

IV.

MICH. CONST. 1963, ART. IV, §6 IS VOID AS AN INTEGRAL AND INSEPARABLE PART OF A TOTAL APPORTIONMENT MECHANISM PREVIOUSLY DECLARED UNCONSTITUTIONAL BY THE UNITED STATES SUPREME COURT.

In *Marshall v. Hare,* 227 F. Supp. 989 (ED Mich, 1964), rev'd, 378 U.S. 561 (1964), an action was brought one day after the 1963 Constitution was certified as adopted by the Board of State Canvassers, seeking a declaration that the Michigan Constitutional provisions relating to the apportionment of the Michigan Legislature were invalid under the Fourteenth Amendment. Three separate opinions were filed by the three-judge federal Court and the constitutionality of the challenged portions of the Michigan Constitution was upheld in a split decision. Each of the opinions dealt with the entire apportionment scheme of the Michigan Constitution (art. IV, §2-6). On appeal, this Court reversed the lower court in light of its holding in *Reynolds v. Sims*, 377 U.S. 533 (1964). Appellants assert that in reversing the lower court, this Court held all Michigan Constitutional apportionment provisions to be unconstitutional, treating all apportionment provisions as a whole, as did each of the three district judges involved in the case.[4] Appellants' contention in this matter is supported by the opinion of Mr. Justice Souris *In re Apportionment of*

[4] See especially the Opinion of Roth, J., dissenting, at 227 F. Supp. 1010-11.

State Legislature—1964, 373 Mich 247, 258, 128 N.W. 2d. 721, 725 (1964); Mr. Justice T. G. Kavanagh in *In re Apportionment of State Legislature—1972,* 387 Mich 442, 493; 197 N.W. 2d. 249, 271 (1972) and Mr. Justice Levin in the unreported Order of the Michigan Supreme Court of October 2, 1973, *In the Matter of Reapportionment of the Michigan Legislature,* Docket No. 53919 (App. p. 59).

The Michigan Supreme Court has never been presented with the question of severability of art. IV, §6 and the subject has never been discussed in a majority opinion. In *Guinn v. United States,* 238 U.S. 347, 366 (1915), this Court stated:

> " . . . [Severability] is really a question of state law; but, in the absence of any decision on the subject by the supreme court of the state, we must determine it for ourselves."

Certainly it has never been in the interest of the major party Commissioners to argue for the non-severability of this provision; a position, which if successfully asserted, would have ended their parties' own continuing monopoly on the apportionment function. The issues before the Michigan Supreme Court have been limited to argument by the major parties over specific plans adopted pursuant to the provisions of Mich. Const. 1963, art. IV, §6, and have not been concerned with the constitutionality of the mechanism provided by said section.[5] Appellants submit that the

[5] The only previous challenge to Mich. Const. 1963, art. IV, §6 was a proceeding by a group of black electors under art. IV, §6, Paragraph 8 challenging, *inter alia,* the constitutionality of art. IV, § 6 of the Michigan Constitution of 1963. It should be noted that said action did not raise the issue of the severability of art. IV. §6, but rather attacked the constitutionality of said section as an original matter. The action of said electors was summarily dismissed by the Michigan Supreme Court in an unpublished one-sentence order dated September 11, 1972 and was without benefit of accompanying opinion or reasoning.

partisan nature of the Michigan Supreme Court, as described by members of that Court, has prevented a direct consideration of this issue by that Court on its own motion. See Black, J., dissenting, *In re Apportionment of State Legislature—1965-1966,* 377 Mich 396, 408; 140 N.W. 2d. 436 (1966) *appeal dismissed sub nom. Badgley v. Hare,* 385 U.S. 114 (1966), and Black and T. G. Kavanagh, J.J., dissenting, in *In re Apportionment of State Legislature—1972,* 387 Mich 442, 461, 492; 197 N.W. 2d. 249, 256, 271 (1972).

The fact of remand by this Court of *Marshall v. Hare, supra,* and subsequent dismissal after remand serve as no indication of severability. The remand simply indicated that apportionment in Michigan was to comply with the "one man-one vote" standard of *Reynolds v. Sims, supra;* the remand did not indicate or imply that such apportionment was to be accomplished by the Michigan Commission on Legislative Apportionment. The dismissal of *Marshall v. Hare, supra,* on January 17, 1967, by the District Court upon the concurrence of all parties then before the Court to a motion for dismissal was without Opinion as to the constitutionality or severability of Mich. Const. 1963, art. IV, §6.

It is incomprehensible that the people of the State of Michigan, in their adoption of the Constitution of 1963, would have granted a commission composed of eight geographically designated partisans, selected by and accountable only to the major political parties, the critical power of apportionment and districting of the state's legislature without the very specific and rigidly limiting directions unconstitutionally imposed upon the commission by Mich. Const. 1963, art. IV, §§ 2-5. See Souris, J., dissenting, *In Re Apportionment of State Legislature—1964, supra,* at 259. As art. IV, §6 would not have been adopted independently by the voters of Michigan, Appellants submit that

said provision is not severable and thus falls with the rest of its already defunct counterparts. *People v. Sperry & Hutchinson Co.,* 197 Mich 532, 542-544, 164 N.W. 503, 506 (1917), *Campau v. City of Detroit,* 14 Mich. 276, 284-286 (1866).

Appellants therefore submit that the issue of the severability of Mich. Const. 1963, art IV, §6 has never been judicially examined, that the major parties in their apportionment litigation subsequent to this Court's declaration in *Marshall v. Hare, supra,* have seen fit not to raise the issue and disturb their cozy apportionment monopoly, and that this Court should affirm that art. IV, §6 is void as an integral and inseparable part of the total Michigan apportionment scheme previously declared unconstitutional by this Court.

CONCLUSION

It is submitted that the decision of the District Court fails to recognize the rights of minority party voters and independent voters protected by the United States Constitution. Appellants' rights are violated by the Michigan Constitutional apportionment provisions and their statutory counterparts. Appellants believe that the substantial questions presented by this appeal are of public importance and respectfully request this Court to reverse the decision of the District Court and to grant the relief requested in Plaintiffs' Complaint.

Respectfully submitted,

THEODORE W. SWIFT
DAVID W. McKEAGUE
DAVID VANDERHAAGEN
Attorneys for Plaintiffs-Appellants
Foster, Swift & Collins, P.C.
Suite One, Plaza One
401 South Washington Square
Lansing, Michigan 48933
Telephone: (517) 372-8050

APPENDIX

TABLE OF CONTENTS

	Page
Michigan Constitution 1963, article IV, §6	25-27
1963 PA 46 (2nd ex. sess.) M.C.L.A. §4.11 *et seq*, M.S.A. 2.28(1) *et seq*	27-31
Memorandum Opinion of Pratt, District Judge and McCree, Circuit Judge concurring	31-47
Dissenting Opinion of Feikens, District Judge	48-55
Order Denying Pro-Tanto Portion of Prayer for Injunction	56-58
October 2, 1973, unpublished Order of Michigan Supreme Court, *In the Matter of Reapportionment of the Michigan Legislature*, Docket No. 53919, denying a Motion for Relief from Final Judgment	59-60

APPENDIX

MICHIGAN CONSTITUTION OF 1963, ARTICLE IV, SECTION 6

A commission on legislative apportionment is hereby established consisting of eight electors, four of whom shall be selected by the state organizations of each of the two political parties whose candidates for governor received the highest vote at the last general election at which a governor was elected preceding each apportionment. If a candidate for governor of a third political party has received at such election more than 25 percent of such gubernatorial vote, the commission shall consist of 12 members, four of whom shall be selected by the state organization of the third political party. One resident of each of the following four regions shall be selected by each political party organization: (1) the upper peninsula; (2) the northern part of the lower peninsula, north of a line drawn along the northern boundaries of the counties of Bay, Midland, Isabella, Mecosta, Newaygo and Oceana; (3) southwestern Michigan, those counties south of region (2) and west of a line drawn along the western boundaries of the counties of Bay, Saginaw, Shiawassee, Ingham, Jackson and Hillsdale; (4) southeastern Michigan, the remaining counties of the state.

No officers or employees of the federal, state or local governments, excepting notaries public and members of the armed forces reserve, shall be eligible for membership on the commission. Members of the commission shall not be eligible for election to the legislature until two years after the apportionment in which they participated becomes effective.

The commission shall be appointed immediately after the adoption of this constitution and whenever apportionment or districting of the legislature is required by the provisions of this constitution. Members of the commission shall hold office until each apportionment or districting plan becomes effective. Vacancies shall be filled in the same manner as for original appointment.

The secretary of state shall be secretary of the commission without vote, and in that capacity shall furnish, under the direction of the commission, all necessary technical services. The commission shall elect its own chairman, shall make its own rules of procedure, and shall receive compensation provided by law. The legislature shall appropriate funds to enable the commission to carry out its activities.

Within 30 days after the adoption of this constitution, and after the official toal population count of each federal decennial census of the state and its political subdivisions is available, the secretary of state shall issue a call convening the commission not less than 30 nor more than 45 days thereafter. The commission shall complete its work within 180 days after all necessary census information is available. The commission shall proceed to district and apportion the senate and house of representatives according to the provisions of this constitution. All final decisions shall require the concurrence of a majority of the members of the commission. The commission shall hold public hearings as may be provided by law.

Each final apportionment and districting plan shall be published as provided by the law within 30 days from the date of its adoption and shall become law 60 days after publication. The secretary of state shall keep a public record of all the proceedings of the commission and shall be responsible for the publication and distribution of each plan.

If a majority of the commission cannot agree on a plan, each member of the commission, individually or jointly with other members, may submit a proposed plan to the supreme court. The supreme court shall determine which plan complies most accurately with the constitutional requirements and shall direct that it be adopted by the commission and published as provided in this section.

Upon the application of any elector filed not later than 60 days after final publication of the plan, the supreme court, in the exercise of original jurisdiction, shall direct the secretary of state or the commission to perform their duties, may review any final plan adopted by the commission, and shall remand such plan to the commission for further action if it fails to comply with the requirements of this constitution.

1963 PA 46 (2ND EX SESS), P 60; EFF JAN 1, 1964.
M.C.L.A. 4.11 ET SEQ, M.S.A. 2.28(1) ET SEQ.

AN ACT to provide for the organization and functions of the commission on legislative apportionment and the adoption of legislative apportionment and districting plans.

The People of the State of Michigan enact:

Sec. 1. The commission on legislative apportionment established by the 1963 state constitution shall consist of 8 electors, 4 of whom shall be selected by the state central

committee of each of the 2 political parties whose candidates for governor received the highest vote at the last general election at which a governor was elected preceding each apportionment. If a candidate for governor of a third political party has received at such election more than 25% of such gubernatorial vote, the commission shall consist of 12 members, 4 of whom shall be selected by the state central committee of the third political party. One resident of each of the following 4 regions shall be selected by each state central committee: (a) the Upper Peninsula; (b) the northern part of the Lower Peninsula north of a line drawn along the northern boundaries of the counties of Bay, Midland, Isabella, Mecosta, Newaygo and Oceana; (c) southwestern Michigan, those counties south of a region (b) and west of a line drawn along the western boundaries of the counties of Bay, Saginaw, Shiawassee, Ingham, Jackson and Hillside; and (d) southeastern Michigan, the remaining counties of the state.

Sec. 2. No officers or employees of the federal, state or local governments, excepting notaries public and members of the armed forces reserve, shall be eligible for membership on the commission. Members of the commission shall not be eligible for election to the legislature until 2 years after the apportionment in which they participated becomes effective.

Sec. 3. The commission shall be appointed immediately upon the effective date of this act and also whenever apportionment or districting of the legislature is required by the provisions of the constitution. Members of the commission shall hold office until each apportionment and districting plan becomes effective. Vacancies shall be filled in the same manner as for original appointment.

Sec. 4. The secretary of state shall be secretary of the commission without vote and shall keep a public record of all its proceedings. He shall furnish, under the direction of the commission, all necessary technical services. The commission shall elect its own chairman and make its own rules of procedure. Each member of the commission shall receive compensation at the rate of $35.00 per day plus actual and necessary expenses while on the business of the commission, in accordance with the provisions of the standard travel regulations issued by the department of administration. Members shall not be reimbursed for more than 20 round trips by the usually traveled route from their residence to the regular meeting place of the commission.

Sec. 5. Within 30 days after the effective date of this act, and also after the official total population count of each federal decennial census of the state and its political subdivsions is available, the secretary of state shall issue a call convening the commission not less than 30 nor more than 45 days thereafter. The commission shall complete its work within 180 days after all necessary census information is available. The commission shall proceed to district and apportion the senate and house of representatives according to the provisions of the constitution. All final decisions shall require the concurrence of a majority of the members of the commission. The commission shall hold at least one public hearing in the state capitol and such other public hearings as they deem appropriate. The commission shall issue appropriate notices of the hearings.

Sec. 6. (1) The secretary of state shall publish in pamphlet form each final apportionment and districting plan within 30 days from the date of its adoption by the commission on legislative apportionment. The publications shall contain the plan, suitable maps and tables showing

the population and area of each district, and the certificate of the secretary of state as to the date of publication. A final apportionment and districting plan shall become law 60 days after such date of publication.

(2) The secretary of state shall print a sufficient number of the pamphlets to furnish:

(a) To the clerk of the house and the secretary of the senate, 500 copies each.

(b) To each county clerk, 10 copies plus an additional 10 copies for each senatorial or representative district to which the county is entitled under the plan.

(c) To the state central committee of each major political party, 100 copies.

(3) The secretary of state shall include the plan in the bound volume of the public acts of the first regular session following the date on which the plan becomes law.

Sec. 7. If a majority of the members of the commission cannot agree on a plan, each member of the commission, individually or jointly with other members, may submit a proposed plan to the supreme court. The supreme court shall determine which plan complies most accurately with the constitutional requirements and shall direct that it be adopted by the commission and published as provided in this act.

Sec. 8. Upon application of any elector filed not later than 60 days after final publication of a plan, the supreme court, in the exercise of original jurisdiction, shall direct the secretary of state or the commission to perform their duties, may review any final plan adopted by the commission, and shall remand such plan to the commission for further action it it fails to comply with the requirements of the constitution.

Sec. 9. This act shall take effect on January 1, 1964.

Sec. 10. Act No 77 of the Public Acts of 1953, being sections 4.601 and 4.602 of the Compiled Laws of 1948, and Act No 178 of the Public Acts of 1953, being section 4.31 of the Compiled Laws of 1948, are repealed.

MEMORANDUM OPINION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Henry Dodge, Zolton Ferency, Barbara Halpert and Dwight W. Johnson, Plaintiffs, vs. Richard H. Austin, Secretary of State, State of Michigan, Defendant, and Lillian Hatcher, Edwin P. Hughes, A. Robert Kleiner and Virginia Selin, Intervening Defendants.	Civil Action No. 4-70235

MEMORANDUM OPINION

PRATT, District Judge, delivered the opinion of the Court in which McCREE, Circuit Judge, concurred.

FEIKENS, District Judge, dissented.

Plaintiffs herein, as individuals and as representatives of a class, challenge the constitutionality of Article IV, Section 6 of the Michigan Constitution of 1963, which es-

tablishes the Michigan Legislative Apportionment Commission. Two of the plaintiffs are members of the Human Rights Party and have been candidates of that party for state office. One of the plaintiffs is a member of the American Independent Party and was a candidate of that party for Congress in 1972. The other plaintiff is an independent voter.

The defendant is the Secretary of State, State of Michigan, and has certain duties with regard to the administration of the legislative apportionment scheme and elections.

Intervening defendants are Democratic Party members of the Michigan Legislative Apportionment Commission.

The Court is satisfied that the plaintiffs conform to the requirements of Rule 23, Rules of Civil Procedure, and that the matter may proceed as a class action.[1] Further, the Court determines that under the holding of *Sierra Club* v. *Morton*, 405 U.S. 727 (1972) the plaintiffs have standing to bring this action. See also *Marshall* v. *Hare*, 227 F. Supp. 989, 990 (E.D. Mich. 1964); *Baker* v. *Carr*, 369 U.S. 186; *Flask* v. *Cohen*, 392 U.S. 83; *Schiaffo* v. *Helstoski*, 492 F.2d 413, 423 (3rd Cir. 1974).

Legislative apportionment in the State of Michigan is controlled by Section 6, Article IV, Constitution of 1963 and the implementation statute enacted pursuant thereto, 1963 Mich. P.A. 46, 2d Extra Session, MCLA 4.11. The apportionment scheme is substantially as follows:

There is established a Commission on legislative apportionment consisting of eight members, four of whom are

[1] The claim of intervening defendants that plaintiffs cannot adequately represent the class of minority party members and independent voters because of the alleged conflict of interest as to plaintiffs' counsel is found to be without merit.

selected by the state organizations (the State Central Committees) of each of the two political parties whose candidates for governor received the highest number of votes at the preceding gubernatorial election. In the event a third political party gubernatorial candidate receives more than 25 per cent of the vote, the Commission is expanded to twelve, and the latter party selects the additional four members of the Commission. Section 6 also requires that one resident of each of the following four regions be selected by each party organization: the Upper Peninsula, the Northern part of the Lower Peninsula, Southwestern Michigan and Southeastern Michigan.[2]

The Commission is required to prepare and submit an apportionment plan after each federal decennial census. In the event a majority of the Commission cannot agree on a plan, each member of the Commission, individually or jointly with other members, may submit a proposed plan to the Supreme Court of the state which is then to determine which plan complies most accurately with constitutional requirements. In addition, any elector may apply to the Supreme Court for review of any final plan adopted.

In accordance with that mandate, the Michigan Apportionment Commission met after the 1970 federal census, but failed to obtain majority approval of any submitted plan. Consequently, the Michigan Supreme Court on May 4, 1972, ordered the adoption of a plan known as the

[2] Section 6 defines the areas in specific detail. The population figures for each region are approximated as: the Upper Peninsula and the Northern part of the Lower Peninsula, less than 5% each; Southwestern Michigan, 20% and Southeastern Michigan, 70%.

"Hatcher-Kleiner Plan." *In Re Apportionment of Legislature,* 387 Mich. 442 (1972).[3]

Plaintiffs here do not challenge the Hatcher-Kleiner Plan as such, but rather claim that the apportionment scheme promulgated by the 1963 Constitution is constitutionally infirm for three reasons:

1. The selection of commission members from geographical districts violates the principle of "one man, one vote." *Reynolds* v. *Sims,* 377 U.S. 533 (1964).

2. The delegation of the authority to select commission members to the two leading political parties impinges upon the rights of the plaintiffs to associate freely and to cast their electoral votes effectively, and

3. Section 6, Article IV is void because it is an inseparable part of the total apportionment scheme found to be unconstitutional by the Supreme Court in *Marshall* v. *Hare,* 378 U.S. 561 (1964).

Plaintiffs requested a declaratory judgment determining that the Michigan Apportionment Commission provisions of Section 6 and the implementation statute violate the First Amendment and the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution and an injunction restraining the defendant from conducting any elections under the Hatcher-Kleiner Plan.

A three-judge court was convened pursuant to 28 U.S.C. 2281 and all parties agreed that the matter be submitted at a plenary hearing on the basis of cross-motions for summary judgment.

---

[3] The "Hatcher-Kleiner Plan" reflects a per cent deviation in actual v. average population per seat of 0.0 as to both houses of the legislature. *Legislative Apportionment Tables, 1972, Reapportionment in the Seventies, Council of State Governments.*

Application of the One Man, One Vote Principle.

Since the crystallization of the one man, one vote principle in *Reynolds* v. *Sims, supra,* the courts have been frequently confronted with the question of its application to particular governmental units. Of primary significance is the case of *Hadley* v. *Junior College District,* 397 U.S. 50 (1970) and the following succinct statement:

> "We have also held that where a State chooses to select members of an official body by appointment rather than election, and that choice does not itself offend the Constitution, the fact that each official does not 'represent' the same number of people does not deny those people equal protection of the laws. *Sailors* v. *Board of Education,* 387 U.S. 105 (1967) . . ."
> 397 U.S. at 58.

Insofar as this case is concerned, since the Commission members are appointed rather than elected, our inquiry is directed to the test implicit in the phrase ". . . and that choice (between elective and appointive officers) does not itself offend the Constitution." In those circumstances the Court has concerned itself with the nature and function of the governmental units involved. Thus, in *Sailors, supra,* the Court found that:

> "Since the choice of members of the county school board did not involve an election and since none was required for these non-legislative officers, the principle of 'one man, one vote' has no relevancy." 387 U.S. at 111.

In *Avery* v. *Midland County,* 390 U.S. 474 (1968) on the other hand, the Court held that the principle did apply to the election of County Commissioners having broad powers

which ". . . include the authority to make a substantial number of decisions that affect all citizens . . ." at 484.

The Court, it should be noted, has in its analysis of such units shied away from the "legislative" vis a vis "administrative" dichotomy as is evidenced by *Avery, supra,* and by *Hadley, supra,* where the Court said:

> "It has also been urged that we distinguish for apportionment purposes between elections for 'legislative' officials and those for 'administrative' officers. Such a suggestion would leave courts with an equally unmanageable principle since governmental activities 'cannot easily be classified in the neat categories favored by civics texts,' . . . and it must also be rejected." 397 U.S. at 55, 56.

Using the foregoing language as a guideline, it does not appear that the Michigan Legislative Apportionment Commission falls within a type whose mode of election is offensive to the Constitution. Its function, whether labeled "legislative" or not, is highly limited and specialized—the preparation and submission of an apportionment plan. It has no other governmental duties or prerogatives.

In *Grivetti* v. *Illinois State Electoral Board,* 335 F.Supp. 779, affirmed 406 U.S. 913 (1972), in considering a similar attack on the Illinois apportionment scheme, the District Court said:

> "Because the redistricting commission is appointive and exercises a specialized legislative function, and does that only when the legislature chooses to default, the challenges to the federal validity of the Illinois Redistricting Commission must fail. A variant of the challenges might be based on the clause in Article IV, Section 4, of the federal constitution that every state is guaranteed a republican form of government.

Whether a republican form of government requires redistricting to be performed by the legislature, however, is the kind of question declared 'political' in *Luther* v. *Borden,* 48 U.S. 1, 7 How. 1, 12 L.Ed. 581 (1849).

Even if it is considered that the reapportionment function is wholly legislative, the discretion of the commission is restricted by the standards enforced by the courts since *Reynolds* v. *Sims,* as well as by the standards set by the Illinois Constitution.

In reaching this conclusion, we are persuaded particularly by the fact that about one-third of the states have assigned legislative reapportionment outright to administrative agencies or commissions. About one-half of these states have removed the apportionment function completely from the legislature and the remaining states provide, as does Illinois, for use of the commission as a backstop in the event of legislative failure to redistrict. We have discovered no successful attempt to invalidate any of these agencies, either on the basis of unconstitutional delegation of power or violation of one-man-one-vote principles . . ." 335 F.Supp. 790.

Again in *Gaffney* v. *Cummings,* 412 U.S. 735 (1973), the Court, although not squarely faced with the issue, impliedly approved of the Connecticut appointed, bi-partisan apportionment commission and stated:

> ". . . [S]tate reapportionment is the task of local legislatures or of those organs of state government selected to perform it." 412 U.S. at 751.

While item by item comparisons reveal distinctions among the selection methods of Michigan, Illinois and

Connecticut, it is not deemed that such distinctions are significant nor fatal to the Michigan scheme. Especially is this so in view of the statutory supervision of political parties in Michigan and the access of the electorate to them;[4] in view of the opportunity afforded *any* elector to contest the final plan by application to the Supreme Court of the state; (Article IV, Section 6, Constitution of 1963); and in view of the Section 6 provision that a third party garnering more than 25 per cent of the gubernatorial vote is given equal representation on the Commission.[5]

Accordingly, this Court finds that the one-man, one-vote principle enunciated in *Reynolds* v. *Sims, supra,* has no relevancy to the Michigan Apportionment Commission.

Delegation of Selection Authority.

The plaintiffs also claim that the delegation of the selection authority to the two major political parties is impermissible because it violates their rights of free speech and association under the First Amendment, and denies them their rights to equal protection and due process under the Fourteenth Amendment of the United States Constitution.

---

[4] See MCLA 168.624, 168.594, 168.595, 168.597. Under Michigan law, a Michigan voter need not declare party affiliation and may vote for precinct delegate of any party. The latter elect state convention delegates who, in turn, elect the state central committee. The state central committee selects the members of the apportionment commission. Michigan legislators are ex officio delegates to the state convention and also participate in the selection of state central committee members.

[5] For purposes of clarity, it is noted that in order to obtain a position on the *ballot*, a new political party is required to file petitions containing a total number of signatures not less than 1% of those votes cast for the successful candidates for the office of Secretary of State. MCLA 168.680.

The gravamen of plaintiffs' First Amendment claim is that the apportionment process is an integral part of the election process and is, therefore, subject to the closest scrutiny in determining its effect on those rights. See *Williams* v. *Rhodes,* 393 U.S. 23 (1968); *Moore* v. *Ogilvie,* 394 U.S. 814 (1969); *Bullock* v. *Carter,* 405 U.S. 134 (1972).

In the recent cases of *Storer* v. *Brown,* 415 U.S. 724 (1974) and *American Party of Texas* v. *White,* 415 U.S. 767 (1974), the Supreme Court has impliedly restricted the *Williams-Moore* approach to those cases in which there are presented "substantial burdens on the right to vote or associate." 415 U.S. at 729. An analysis of the Michigan apportionment scheme does not indicate there is a direct effect on the election process as contemplated by *Storer* and *American Party of Texas, supra,* nor is there apparent a substantial burden since it is the product not the composition of the commission that affects the vote.

Plaintiffs claim, however, that there is a subtlety inherent in the scheme that fosters invidious discrimination because the major political parties will engage in "gerrymandering" to perpetuate themselves to the detriment of minorities. This argument is refuted by *Gaffney* v. *Cummings, supra,* and particularly in the following language:

> "Within the limits of the population equality standards of the Equal Protection Clause, they (the Reapportionment Commission) seek, through compromise or otherwise, to achieve the political or other ends of the State, its constituents, and its officeholders. What is done in so arranging for elections, or to achieve political ends or allocate poltical power is not wholly exempt from judicial scrutiny under the Fourteenth Amendment. As we have indicated, for example, multimember districts may be vulnerable, if

> racial or political groups have been fenced out of the political process and their voting strength invidiously minimized. Beyond this, we have not ventured far or attempted the impossible task of extirpating politics from what are the essentially political processes of the sovereign States. Even more plainly, judicial interest should be at its lowest ebb when a State purports fairly to allocate political power to the parties in accordance with their voting strength and, within quite tolerable limits, succeeds in doing so." (Citations omitted.) 412 U.S. at 754.

Then, the fact that political considerations play a role in and may even dominate the apportionment process does not render the scheme unconstitutional. The plaintiffs may, as any elector may, challenge any final plan if it invidiously discriminates against any racial, religious or political group.

The equal protection claim of the plaintiffs is not altogether dissimilar in nature from their First Amendment claim. The assertion is that the present scheme perpetuates and places vast amounts of political power, which is exercised by and through the apportionment process, in the hands of the two, established political parties. Thus, they assert, they are denied access to the apportionment process in contravention of the Fourteenth Amendment.

The implications of *Gaffney* v. *Cummings, supra,* and *Grivetti* v. *Illinois State Electoral Board, supra,* appear to rebut the equal protection argument where bi-partisan commissions are provided. Perhaps even more enlightening is *Pirincin* v. *Board of Elections of Cuyahoga County,* 368 F. Supp. 64, aff'd 414 U.S. 900 (1974).

As the Court in *Gaffney, supra,* recognized, the reality is that political considerations are an inherent element of

the apportionment process and that gerrymandering may well be the result.[6] In that pragmatic vein both *Grivetti* and *Pirincin* spoke to the subject of minority representation.

Thus, in *Grivetti:*

> "If every minority or other identifiable group demanded representation on the commission, it would necessarily become as large as the legislature (citation omitted) and probably would be as ineffective as the legislature has proved to be in reapportionment matters." 335 F. Supp. 791.

And in *Pirincin:*

> "The reasonableness of the methods of selection of boards of elections may be tested by considering alternative methods. Were each county board enlarged to include representatives of all minority parties as well as independent voters, it is likely that the boards would be unwieldy. They would be too large to function as election machinery managers. Moreover, it is apparent that one or two independent voters who might be appointed could not truly serve as adequate representatives of all independent voters. Each independent voter can really only represent himself." 368 F. Supp. at 72.

Plaintiffs assert, however, that such generalizations do not satisfy the "close scrutiny" test that is applicable to the case at bar. In this assertion, plaintiffs revert to the premise that the apportionment process is an integral part

---

[6] "The reality is that districting inevitably has and is intended to have substantial political consequences. 412 U.S. 753.

of the election process, an assertion also found wanting in the discussion on the First Amendment claim, *supra.*

The Court in *Pirincin, supra,* relied on *McGowan* v. *Maryland,* 336 U.S. 420 (1961) as its authority for applying the "rational basis" test, and certainly the following language of *McGowan* is particularly applicable:

> "State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." 366 U.S. 425-426.

In the context of a reapportionment scheme, some distance removed from the election process, it is difficult to discern any reason for the application of the close scrutiny test.[7]

That the Michigan apportionment scheme passes muster under the rational basis test is evident not only in its comparison with the schemes and methods approved in *Gaffney, Grivetti* and *Pirincin, supra,* but also by a perusal of the Official Record of the Michigan Constitutional Convention. Official Record. P. 2024.

The third prong of the attack by the plaintiffs on the delegation of the selection authority to political parties is based on a claimed violation of the Fourteenth Amendment due process rights. In effect plaintiffs claim that the state cannot delegate authority to regulate political affairs to interested parties in derogation of the rights and interests of a minority which is also interested. This thesis is best described by *Carter* v. *Carter Coal Co.,* 208 U.S. 238 (1936). See Jaffe, "Law Making by Private Groups", 51 Harv. L.R. 201 (1937).

[7] See also *Weiss* v. *Duberstein,* 445 F.2d 1297, '300 (2nd Cir. 1971) where the Court held: "The limitation of certifying authority to the chairman of the two dominant political party committees . . . raises a constitutional issue, namely, whether there is a rational basis for so limiting the certificating authority." 445 F.2d at 1300.

Even assuming that the type of delegation here in question presents a federal question (See *Ohio Ex Rel Bryant* v. *Akron Metropolitan Park District,* 281 U.S. 74 (1930); *Grivetti* v. *Illinois State Electoral Board, supra),* it is readily distinguishable from the type of delegation contemplated by the *Carter* case. The Michigan apportionment scheme as described heretofore, is not divorced from governmental connection and control. As a matter of fact, for its limited, specialized functions, the Commission becomes, by constitutional mandate, the "organ of state" prescribed by *Gaffney, supra:*

> " . . . state reapportionment is the task of local legislatures or of those organs of state government selected to perform it." 412 U.S. at 751.

In view of the structure and function of the Commission and the built-in safeguards of Section 6, Article IV of the Michigan Constitution of 1963, it can hardly be argued that the Commission is a private body. Nor are the state central committees of political parties private bodies in the sense of the *Carter, supra,* parameters. Finally, of course, the state central committees merely select members who comprise the Commission, they do not exercise any other authority in the apportionment scheme.

Inseparability of Apportionment Scheme.

Plaintiffs also claim that the decision of *Marshall* v. *Hare,* 277 F. Supp. 989 (E.D. Mich. 1964) rev'd 378 U.S. 561, voided the entire apportionment scheme of the Michigan Constitution of 1963, including the establishment of the Apportionment Commission.

It is well settled that the construction of a state constitution is the prerogative of the Supreme Court of that state, *Reitman* v. *Mulkey,* 387 U.S. 369 (1971), and that the severability of state statutes must be determined under and by application of state law. *Morey* v. *Doud,* 354 U.S. 457, 469-70 (1957).

Michigan law appears to be in accord with the prevailing view that the unconstitutionality of one section of a statute does not affect other sections so long as the remaining sections can be given legal effect and the two are so independent of each other that the Court can say that the legislature would have passed the latter if the former had been omitted. *People* v. *McMurchy,* 249 Mich 147 (1930); *Robinson* v. *Wayne Circuit Judges,* 151 Mich 315 (1908); *People* v. *Victor,* 287 Mich. 506 (1939), See also *Dorchy* v. *Kansas,* 264 U.S. 286, 291 (1924).

It is manifest, of course, that the provision in question has, in fact, been given legal effect and has been operative. It is also apparent from the record of the Constitutional Convention that it intended that a commission or other non-legislative body perform the apportionment function, regardless of the apportionment formula which it also adopted. See 2 Constitutional Convention 1961, pages 2014-5.

Further, it appears that the Michigan Supreme Court itself has by implication determined that Section 6 is separable. *In Re Apportionment of Legislature,* 387 Mich 442 (1972); *In Re Apportionment of Legislature,* 377 Mich. 396, 422 (1966); *In Re Apportionment of Legislature,* 373 Mich. 247 (1964).

Summary.

With *Reynolds* v. *Sims, supra,* the United States Supreme Court entered the "political thicket" of apportionment. As a consequence, federal courts have frequently been required to confront substantial issues directly and peripherally related to the one-man, one-vote principle. However, the Court has cautioned against wholesale and indiscriminate applications of that principle to all state actions involving political affairs. Even though it has repeatedly emphasized the protection of constitutional rights, it has counseled circumspection. Two admonitions have particular significance to the matter at hand and dictate inclusion here.

The first is contained in *Sailors, supra,* where the Court said:

> "When we stated ' . . . the state legislatures have constitutional authority to experiment with new techniques' . . . we were talking about the Due Process Clause of the Fourteenth Amendment, as was Mr. Justice Holmes, . . . when he said ' . . . a constitution is not intended to embody . . . the organic relation of the citizen to the State . . . ' . . . Save and unless the state, county, or municipal government runs afoul of a federally protected right, it has vast leeway in the management of its internal affairs." 387 U.S. 109.

The second appears in *Gaffney, supra,* when the Court said in discussing the concept of apportionment:

> " . . . It would be idle, we think, to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it . . . Politics and political considerations are inseparable from districting and apportionment . . . The reality is that districting inevitably has and is intended to have substantial political consequences." 412 U.S. 752 and 753

Placed in the perspective commanded by the above quotations, it is clear to this Court that the Michigan Apportionment Commission scheme provided in Article IV, Section 6 of the 1963 Constitution is not infirm under the First or Fourteenth Amendments of the United States Constitution.

Plaintiffs' Motion for Summary Judgment is, therefore, denied. Defendant's and intervening defendants' Motions for Summary Judgment are, therefore, granted.

IT IS SO ORDERED.

/s/ Philip Pratt
United States District Judge
/s/ Wade H. McCree, Jr.
United States Circuit Judge
Concurring

Dated: April 24, 1975.
Detroit, Michigan.

JUDGMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Henry Dodge, Zolton Ferency, Barbara Halpert and Dwight W. Johnson, Plaintiffs, vs Richard H. Austin, Secretary of State. State of Michigan, Defendant, and Lillian Hatcher, Edwin P. Hughes, A. Robert Kleiner and Virginia Selin, Intervening Defendants.	Civil Action No. 4-70235

This action having come on for hearing, briefs having been submitted by the parties, and the issues having been duly considered and a decision having been duly rendered in the Court's Memorandum Opinion and Order:

IT IS ORDERED AND ADJUDGED that plaintiff take nothing and that the action be dismissed on the merits.

/s/ Philip Pratt
United States District Judge
/s/ Wade H. McCree, Jr.
United States Circuit Judge
Concurring

Dated: April 24, 1975.
Detroit, Michigan

DISSENTING OPINION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

(Title omitted in printing)

(Filed April 24, 1975)

This case considers a challenge to the legislative apportionment procedure of the State of Michigan, Section 6, Article 4, Constitution of 1963 and the implementing statute, M.C.L.A. 4.11. I agree with my brothers that legislative districting need not be done by an elected body, *Sailors* v. *Board of Education,* 387 U.S. 105 (1967), but may be delegated to an "organ of state government", *Gaffney* v. *Cummings,* 412 U.S. 735, 751 (1973). I find no bar to this procedure in the line of cases typified by *Carter* v. *Carter Coal Co.,* 298 U.S. 238 (1936), and I agree that the function of legislative apportionment may properly be delegated without adherence to the "one man, one vote" principle of *Reynolds* v. *Sims,* 377 U.S. 533 (1964). I respectfully dissent, however, from that portion of my brothers' opinion finding the procedure acceptable under the equal protection standards of the fourteenth amendment.

Since this procedure is an integral part of the election process with substantial effect thereon, I believe it requires strict scrutiny. I cannot find any compelling interest for requiring a political party to achieve 25% of the gubernatorial vote before being entitled to *any* voice in the process of legislative apportionment.

The reason I think the *procedure* is so important is because the eventual plan is not an independent product, but is the direct result of the debate and compromise within the apportionment commission. *Gaffney* has made it clear that this commission is allowed to (and even encouraged to) barter and compromise. This being so, it is essential that access to this commission and its compromise be afforded to all significant sectors of the political community.

Of course, not every "incidental burden on the exercise of voting rights is subject to a stringent standards of review". *Bullock* v. *Carter,* 405 U.S. 134 (143 (1971)). However, all procedures used as an "integral part of the election process", *Moore* v. *Ogilvie,* 394 U.S. 814, 818 (1968), or having a "real and appreciable impact on the exercise of the franchise". *Bullock, supra* at 144, must receive strict scrutiny. See also *Williams* v. *Rhodes,* 393 U.S. 24 (1968).

Storer v. *Brown,* 415 U.S. 724 (1974) and *American Party of Texas* v. *White,* 415 U.S. 767 (1974) are read as somehow retreating from the *Moore-Williams-Bullock* set of cases and requiring a *direct* effect on the voter. This is a distinction without a difference, and is not supported by the cited cases. Both *Storer* and *Brown* apply the "compelling interest" test, and both cite *Bullock* as requiring strict scrutiny of any "substantial burden on the right to vote". 415 U.S. at 729.

The apportionment process does have a direct and substantial effect on voters, candidates and political parties.

> "It is not only obvious, but absolutely unavoidable that the location and shape of districts may well determine the political complexion of the area. District lines are rarely neutral phenomena. They can well determine what district will be predominantly Democratic or predominantly Republican, or make a close

> race likely. Redistricting may pit incumbents against one another or make very difficult the election of the most experienced legislator. The reality is that districting inevitably has and is intended to have substantial political consequences." *Gaffney, supra*, 412 at 753.

The decision as to where a candidate may run or where a citizen may vote is certainly an integral part of the election process. My brothers appear to admit as much when they say:

> "[T]he reality is that political considerations are an inherent element of the apportionment process and that gerrymandering may well be the result."

They point out that *Gaffney* recognizes gerrymandering as a fact of political life and legitimizes it so long as the resulting plan meets other constitutional tests. Once the *process* of "gerrymandering" is legitimized as part of the election system, it becomes a part of the election process and plaintiffs are entitled to a hand in the process. No less is required by *Moore* v. *Ogilvie*.

I also think that apportionment has a direct effect on voting and the strength of an individual's ballot. Taking a hypothetical example, let us say a group of University of Michigan students form a political party with enough members to qualify for the ballot. Naturally, these students will almost all live within a couple miles of the University. If a district were formed composed of the university area, this party could very well elect at least one representative. On the other hand, if a plan proposed a district line going up State Street, this would cut this group in half, diluting their vote in each of two other districts. Since racial identities are not involved, it is likely

that either plan would meet the *Gaffney* and *Simms* (sic) tests. Thus, without any voice in the districting *process* the students have been excluded from an integral part of the electoral process. This is not to say that they have a right to any particular district plan. They do, however, deserve a voice in the planning.

Under these circumstances, I would require the state to justify any burden on the right of individuals and political parties to be involved in the apportionment process by showing a compelling interest therefor.

It is sought to avoid assessing the burden placed on the electoral process by labeling the commission a government functionary and by applying the "rational interest test". While the thrust of this dissenting opinion is my belief that the compelling interest test is required, I am also convinced that the record before us fails even to disclose a rational interest supporting the Michigan plan. The phrase "rational interest" is not a magic incantation absolving courts of their constitutional decision-making responsibilities. Courts must still determine whether the connection between the challenged activity and the legitimate state interest is indeed a rational one. This decision may not be the product of speculation, but must take account of the *practical effect* of the practices involved and the alternatives available.

> "It is very unlikely that all or even a large portion of the state election laws would fail to pass muster under our cases; and the rule fashioned by the Court to pass on constitutional challenges to specific provisions of election laws provides no litmus-paper test for separating those restrictions that are valid from those that are invidious under the Equal Protection Clause. The rule is not self-executing and is *no substi-*

tute for the hard judgments that must be made. Decision in this context, as in others, is very much a 'matter of degree', *Dunn* v. *Blumstein, supra,* at 348, very much *a matter of 'consider[ing] the fact and circumstances behind the law, the interests which the State claims to be protecting, and the interest of those who are disadvantaged by the classification.' Williams* v. *Rhodes, supra,* at 30; *Dunn* v. *Blumstein, supra,* at 335. What the result of this process will be in any specific case may be very difficult to predict with great assurance." *Storer* v. *Brown,* 415 U.S. 724, 730 (1973) (emphasis added).

See also *U. S. Dept. of Agriculture* v. *Moreno,* 413 U.S. 528, 537 (1973).

Under current Michigan law a group wishing a voice in legislative districting must form a political party, run a candidate for governor and receive 25% of the gubernatorial vote. The record now before the court does not establish the rationality of this procedure. Since the apportionment commission consists of either eight or twelve members, it would seem to be rational to require a group seeking to participate in the process to show the support of either one-eighth or one-twelfth of the electorate. Instead, under current Michigan law a group must come up with twice that amount. Additionally, rather than to proportionalize representation on the commission, Michigan automatically gives each of the two dominant parties either one-half or one-third of the decision-making power. There is no opportunity for independents to participate at all, though independent voters, according to recent polls, appear to outnumber one of the organized political parties involved. The effect of this procedure may be to freeze the status quo and to perpetuate Democratic and Republican

party strength at the expense of independent voters and small political parties. This is not permitted, even under the "pragmatic" approach of *Gaffney.*

> "But neither we nor the district courts have a constitutional warrant to invalidate a state plan, otherwise within population limits, because it undertakes, *not to minimize or eliminate* the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of *proportional representation* in the legislative halls of the State." *Gaffney, supra,* 412 U.S. at 754 (Emphasis supplied).

Under my brothers' reasoning all that is required to satisfy the equal protection requirements of the fourteenth amendment is the labeling of the commission as a governmental organ and the application of the "rational interest" test. Using this logic, a state could vest the power to pick all members of the apportionment committee in the chairman of the party receiving the most votes at the last election. Though this grants a virtual monopoly to that party, and excludes all others, it would be immune from equal protection consideration. The only difference between this example and current law is that in Michigan the monopoly is granted to two parties rather than one. All others are still excluded. In the context of elections and election procedure the Supreme Court has never approved a requirement that a party show the support of 25% of the active electorate in order to participate on an equal level. See *Williams* v. *Rhodes, supra; Storer* v. *Brown, supra; Jenness* v. *Forston,* 403 U.S. 431 (1971).

Defendants argue that individuals and minority parties are protected since they can challenge any plan in the Michigan Supreme Court. This minimal protection, how-

ever, does not carry with it a fraction of the political power afforded the major parties. Individuals may only be heard in opposition to a specific plan. The right to propose plans to the court is afforded only to members of the apportionment commission. *See* Michigan Constitution of 1963, Article 4, §6; *In re Apportionment of Legislature,* 387 Mich. 442, 451 (1972). As is made clear in *Gaffney,* many plans with widely differing political consequences can pass muster under population and constitutional standards. Under the Michigan scheme, a voice in the political process of apportionment may be heard only at the commission level.

My brothers cite *Gaffney; Grivetti* v. *Illinois State Electoral Board,* 335 F. Supp. 779, *aff'd,* 406 U.S. 913 (1972); and *Pirincin* v. *Board of Elections of Cuyahoga County,* 368 F. Supp. 64, *aff'd,* 414 U.S. 990 (1974) as cases in which federal courts have upheld similar procedures. These cases stand on substantially different ground. In *Gaffney* the challenge was to a specific districting plan, not to a procedure. And, the plan there before the court had been adopted by a board of three state judges—*not* by the bipartisan commission. In *Grivetti,* the commission was appointed by state legislators. *Gaffney* specifically approved apportionment as a legislative function. By voting for members of the legislature any voter can influence the apportionment process as directly as one vote affects any decision. More important, the legislature proportionately reflects the political composition of its constituency. This body "in no way freezes the status quo, but implicitly recognizes the potential fluidity of American political life." *Jenness* v. *Forston, supra,* 403 U.S. at 439.

This is not to say that the constitution requires a direct election of the commission. *Sailors* v. *Board of Education,*

387 U.S. 105 (1967) has made that clear. What is required is that those appointing *or* composing the commission be accountable in some form to the electorate. Such was the case in both *Gaffney* and *Grivetti.* Under the Michigan scheme the members of the commission are accountable only to their respective political parties. To have any voice in the apportionment process a minor party supporter or independent must participate in a major party's political apparatus. This is a substantial burden not present in *Gaffney* or *Grivetti.*

In *Pirincin* the executive committee of each of the two dominant parties did practically speaking select members of the board of elections. However, that body had functions much different from those here at issue, and did *not* take part in legislative apportionment. The largely administrative functions of the Cuyahoga Board of Elections did not have a "real and appreciable impact on the exercise of the franchise", and were therefore subject to a lesser standard of scrutiny.

Applying the compelling interest test, as I feel should be done, Michigan's apportionment scheme fails to meet the equal protection requirements of the fourteenth amendment. Even if we apply the rational basis test, I believe that we should deny summary judgment and proceed to a full hearing. No reason now appears in the record rationally supporting the 25% requirement for participation on the commission, and I would require the state to make such a showing before approving this scheme.

/s/ John Feikens
United States District Judge

Dated: Detroit, Michigan.
April 24, 1975.

ORDER DENYING PRO TANTO PORTION OF PRAYER FOR INJUNCTION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

(Title omitted in printing)

(Filed April 24, 1974)

This matter came on to be heard on Cross Motions for Summary Judgment and on the Stipulation for Acceleration of Decision of Legal Issues and Preservation of Factual Positions.

The Court is mindful of the election schedule of the State of Michigan and recog nizes the degree of urgency inherent therein. Therefore, it is considered prudent to determine immediately the injunctive relief requested as it affects the 1974 Michigan election for members of the legislature.

The Complaint seeks to enjoin the enforcement of, or otherwise giving future effect to the Legislative Apportionment Plan adopted by the Michigan Commission on Legislative Apportionment under date of May 23, 1972, in any way whatsoever, including but not limited to, the holding of the election for state legislators in the fall of 1974 and the requisite primary election prior thereto in accordance with said plan.

It is observed at the outset that the plaintiffs herein do not contend that the 1972 Apportionment Plan is infirm because it is violative of the one-man, one-vote principle first enunciated in *Reynolds* v. *Sims,* 377 U.S. 533 (1964). As a matter of fact, the 1972 Apportionment Plan has been approved in a decision by the Supreme Court of the State

of Michigan, and no appeal was taken therefrom. *In re Apportionment of State Legislature—1972.* 387 Mich. 442 (1972) and Amended Order denying Motion for Relief from Final Judgment, issued October 2, 1973. Thus that issue is not before us.

Rather the thrust of plaintiffs' Complaint is a collateral attack on that Plan and any future apportionment plan promulgated by the Legislative Apportionment Commission based on the assertions that the Michigan constitutional and legislative provisions which establish that body are violative of federal constitutional provisions.

The imminence of the Michigan election prompts us to consider whether, pending a final determination as to these assertions of constitutional infirmities, the enforcement of the 1972 plan promulgated by the Apportionment Commission must be enjoined when the Plan itself has judicially been found to be valid.

It is well established in our jurisprudence that the acts of governmental bodies, acting under color of law, are not thereby invalidated if those bodies are later determined or discovered to have been improperly constituted. For example, in apportionment cases, the United States Supreme Court has ordered that malapportioned legislatures redistrict themselves. *Reynolds* v. *Sims, supra.* In *Roman* v. *Sincock,* 377 U.S. 695, 709 (1964), the Court, in finding the Delaware legislature was constitutionally malapportioned, said:

> " . . . In giving the Delaware Legislature an opportunity to adopt a constitutionally valid plan of legislative apportionment, and in deferring decision until after the November 1962 general election, because of the imminence of that election and the disruptive effect which its decision might have had, the District Court acted in a wise and temperate manner."

See also *Dawson* v. *Bomar,* 322 F.2d 445 (6th Cir. 1963), *cert. den.* 376 U.S. 933; *Baker* v. *Carr,* 369 U.S. 186, 250, footnote 5, concurring opinion of Douglas, J. (1961); *Ryan* v. *Tinsley,* 316 F.2d 430 (10th Cir. 1963), *cert. den.* 375 U.S. 17.

The application of the rationale of that principle to the case at bar, and the particular concern of this Court for the avoidance of disruption and confusion that would result at this time, dictate that we deny that portion of the prayer for injunctive relief which sought to restrain the enforcement of the 1972 Apportionment Plan as it relates to the 1974 Michigan election.

It should be understood that the foregoing is not intended as commentary on the merits of plaintiffs' case or on the balance of the relief sought by plaintiffs and that this Court still has under consideration the justiciable issues relating to the asserted constitutional infirmities of the Michigan Apportionment Commission and its future acts.

IT IS THEREFORE ORDERED that the portion of the prayer for an injunction which sought to enjoin the defendant from enforcing or otherwise giving effect to the 1972 Legislative Apportionment Plan as to the 1974 legislative elections is denied.

/s/ Wade H. McCree, Jr.
United States Circuit Judge

/s/ John Feikens
United States District Judge

/s/ Philip Pratt
United States District Judge

Dated: Detroit, Michigan.
April 24, 1975.

AMENDED ORDER

(State of Michigan—Supreme Court)

IN THE MATTER OF
REAPPORTIONMENT OF
THE MICHIGAN LEGISLATURE. } 53919

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 2nd day of October in the year of our Lord one thousand nine hundred and seventy-three.

Present: The Honorable Thomas M. Kavanagh, Chief Justice; Thomas E. Brennan, Thomas G. Kavanagh, John B. Swainson, G. Mennen Williams, Charles L. Levin, Mary S. Coleman, Associate Justices.

On order of the Court, the motions by petitioners Paul G. Goebel, Sr., Ralph E. Huhtala and Anthony C. Licata for relief from final judgment and to designate parties to proceedings are considered, and the same are hereby DENIED.

Justice T. G. Kavanagh would grant review for the reasons set forth in his dissenting opinion in *In re Apportionment of State Legislature--1972,* 387 Mich 442 (1972).

Justice Levin would grant review as he finds persuasive the views expressed by Mr. Justice T. G. Kavanagh in the 1972 legislative apportionment case and earlier by Mr. Justice Souris in *In re Apportionment of Legislature,* 373 Mich 247, 258 (1964), who concluded that since the provisions in the Michigan Constitution for apportioning and

districting both houses of the Michigan Legislature were violative of the United States Constitution, as set forth in the one person—one vote decisions of the United States Supreme Court, the commission on legislative apportionment can no longer "proceed to district and apportion the senate and house of representatives according to the provisions of this constitution," (art 4, § 6) and, accordingly, the parts not being severable, the apportionment commission fell with the other provisions.

Justice Coleman would grant review to consider (1) whether the procedure for selecting members of the committee on legislative apportionment as set forth in Const 1963, art 4, § 6 places a heavy and discriminatory burden upon minority parties and independent voters, denying these distinct and substantial elements of the voting public an opportunity to participate in a vital phase of the election process, in violation of the United States Constitution; (2) whether Const 1963, art 4, § 1 impermissibly delegates legislative power; and (3) whether the commission on legislative apportionment and this Court relied solely or unduly upon the erroneous presumption that apportionment of state legislative districts must reflect mathematical equality of population, thus excluding other constitutional considerations (see Const 1963, art 4, §§ 2, 3) and thereby casting doubt upon the constitutional validity of their efforts. See *Mahan* v *Howell,* 410 US 315; 93 S Ct 979; 35 L Ed 2d 320 (1973); *Gaffney* v *Cummings,*——US——, 93 S Ct 2321; 37 L Ed 2d 298 (1973) and *White* v *Regester,* ——US——; 93 S Ct 2332; 37 L Ed 2d 314 (1973).

State of Michigan—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 2nd day of October in the year of our Lord one thousand nine hundred and seventy-three.

/s/ Harold Hoag,
Deputy Clerk.